

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

UNITED STATES OF AMERICA,

Plaintiff, : Case No. 3:07-cr-205

- vs -

District Judge Thomas M. Rose  
Magistrate Judge Michael R. Merz

EDWIN ARTHUR AVERY,

Defendant. :

---

**REPORT AND RECOMMENDATIONS**

---

This § 2255 case was before the United States Court of Appeals on Defendant's appeal from Judge Rose's denial of Defendant's Motion for Reconsideration (Decision and Entry, ECF No. 66). That court decided that this Court lacked jurisdiction to decide the case because it raised a claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015), which Avery had raised in a prior § 2255 motion. *Avery v. United States*, 770 Fed. Appx. 741, 743 (May 28, 2019). It then ordered the case remanded with instructions to this Court "to dismiss the petition [sic] for lack of jurisdiction." *Id.*

This Court has now received the Mandate of the Sixth Circuit, returning jurisdiction to this Court (ECF No. 73). In obedience to the Mandate, the Magistrate Judge now respectfully recommends that (1) the Court's Order Adopting Report and Recommendations (ECF No. 57) be

VACATED and (2) Defendant Avery's Motion to Vacate (ECF No. 48) be DISMISSED WITH PREJUDICE.

September 17, 2019.

s/ *Michael R. Merz*  
United States Magistrate Judge

#### **NOTICE REGARDING OBJECTIONS**

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by mail. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. See *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).